

**PLAINTIFFS'
OPPOSITION TO
GOOGLE'S MOTION IN
LIMINE NUMBER 4 TO
EXCLUDE EVIDENCE
AND ARGUMENT RE:
JOINING DATA**

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28 **UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

29 CHASOM BROWN, WILLIAM BYATT,
30 JEREMY DAVIS, CHRISTOPHER CASTILLO,
31 and MONIQUE TRUJILLO individually and on
32 behalf of all other similarly situated,

33 Plaintiffs,

34 v.

35 GOOGLE LLC,

36 Defendant.

37 Case No.: 4:20-cv-03664-YGR-SVK

38 **PLAINTIFFS' OPPOSITION TO
GOOGLE'S MOTION IN LIMINE
NUMBER 4 TO EXCLUDE EVIDENCE
AND ARGUMENT RE: JOINING
DATA**

39 Judge: Hon. Yvonne Gonzalez Rogers
40 Date: November 15, 2023
41 Time: 9:00 a.m.

1 **I. INTRODUCTION**

2 Google's motion is styled as one *in limine*, but it reads more like a *Daubert* or summary
 3 judgment motion. Worse, it's a motion Google already lost.

4 Google last year moved to exclude “[e]xpert opinion about hypothetical risks caused by
 5 Google's theoretical capability to link PBM data with users' Accounts or identities.” Dkt. 664
 6 (Schneir *Daubert*) at 15. This Court denied that motion, holding that “***Whether plaintiffs' data can***
 7 ***be linked to other data such that plaintiffs' identity can be revealed is relevant to the issues in this***
 8 ***case.***” Dkt. 803 at 20. So Google seeks a do-over, hoping to exclude evidence “regarding [their]
 9 ability to join data” as supposedly having “no probative value.” Mot. at 2. Google does not even
 10 acknowledge the Court's prior order, let alone distinguish it. And for good reason; the Court was
 11 right. Google's motion should be denied—again.

12 **II. ARGUMENT**

13 **A. Whether Google Links or Can Link Private Browsing Data with Regular
 14 Browsing Data Is Relevant, as this Court Already Held.**

15 In its August 2022 *Daubert* motion regarding Plaintiffs' privacy expert Bruce Schneier,
 16 Google argued that “[e]xpert opinion about hypothetical risks caused by Google's theoretical
 17 capability to link PBM data with users' Accounts or identities is not relevant because Google does
 18 not, in fact, engage in this practice and has policies and processes to prevent it.” Dkt. 664 at 15. This
 19 Court considered and correctly rejected Google's arguments:

20 ***Whether plaintiffs' data can be linked to other data such that plaintiffs' identity can be***
 21 ***revealed is relevant*** to the issues in this case. At this juncture, it appears such information is
 22 at least relevant to the analysis of plaintiffs' intrusion upon seclusion and invasion of privacy
 23 claims, both of which turns on the offensiveness of Google's conduct.

24 Dkt. 803 at 20 (emphasis added). Google now makes the same argument, again:

25 Plaintiffs now appear to have pivoted to a plan to present evidence regarding what Google
 26 “could” do with the data it receives. But Google's *capability* to join does not prove or disprove
 27 Plaintiffs' claims, and would only serve to confuse the jury. . .

28 Mot. at 1, 4. There is no way to reconcile Google's motion with the Court's prior ruling, which is
 29 probably why Google ignores the Court's prior order.

30 The Court was right the first time. Plaintiffs are not required to prove the data is identifying.
 31 “Legally recognized privacy interests” include “interests in making intimate personal decisions or

1 conducting personal activities without observation, intrusion, or interference (“autonomy privacy”).”
 2 *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 654 (1994) (emphasis added). Google’s efforts
 3 to reframe this case around what it does or does not do with the private browsing data it collects and
 4 stores ignores the gravamen of Plaintiffs’ claim that Google was wrong to collect that data in the
 5 first place. “[I]nformation need not be personally identifying to be private.” *In re Google Referrer*
 6 *Header*, 465 F. Supp. 3d 999, 1009-10 (N.D. Cal. 2020).

7 Regardless, Plaintiffs can (and will) argue that private browsing data *is* identifying, including
 8 to rebut Google’s arguments. Google seeks to tell the jury that private browsing data is “anonymous
 9 and orphaned,” such that users have no expectation of privacy. *See* Google’s Draft Pretrial
 10 Statement. Plaintiffs can rebut that argument with evidence that Google stores private browsing data
 11 with identifying information, including IP address, user agent, location information, and signed-in
 12 identifiers associated user’s accounts on non-Google websites. Hochman Rep. § VIII.F (Dkt. 608-
 13 12). The identifying nature of the data makes Google’s behavior all the more offensive—an issue
 14 relevant to (at a minimum) Plaintiffs’ invasion of privacy and intrusion upon seclusion claims, and
 15 Plaintiffs’ requests for punitive damages. Google’s Motion cites just one case to argue that
 16 joinability is irrelevant. *See Mformation Techs., Inc. v. Rsch. in Motion Ltd.*, 2012 WL 2339762, at
 17 *4 (N.D. Cal. June 7, 2012). That case is far afield, focused on patent infringement damages.¹

18 Even the definition of “personal information” in Google’s own Privacy Policy makes it
 19 relevant whether Google can join or link this data. Google’s Privacy Policy defines “personal
 20 information” to include “information that you provide to us which personally identifies you, such as
 21 your name, email address, or billing information, or **other data that can be reasonably linked to**
 22 **such information by Google**, such as information we associate with your Google Account.”²
 23 Plaintiffs are entitled to present evidence demonstrating that private browsing data can be linked to
 24 information tied to users’ Google accounts.

25 California law also undermines Google’s position. Under California law, “personal

27 ¹ The court excluded “third-party valuations” of a patent cited by the defendant’s damages expert
 because the valuations did not “assess the value of the [] Patent at the time infringement began.” *Id.*

28 ² <https://policies.google.com/privacy?hl=en-US> (emphasis added).

1 information” includes “information that identifies, relates to, describes, is *reasonably capable of*
 2 *being associated with, or could reasonably be linked, directly or indirectly, with a particular*
 3 *consumer or household,*” including “Internet or other electronic network activity information,” such
 4 as “browsing history, search history, and information regarding a consumer’s interaction with an
 5 internet website, application, or advertisement.” *In re Google RTB Consumer Priv. Litig.*, 606 F.
 6 Supp. 3d 935, 944 (N.D. Cal. 2022) (Gonzalez Rogers, J.) (citing Cal. Civ. Code § 1798.140). It
 7 strains credulity for Google to suggest that Plaintiffs should be precluded from introducing evidence
 8 or argument about whether private browsing data can “reasonably be linked” to users.

9 **B. Ample Evidence Supports Plaintiffs’ Argument that Private Browsing Data Is**
Identifying, as this Court Already Found.

10 Rather than confront the Court’s prior order on this exact issue, Google resorts to arguments
 11 best suited for summary judgment or trial. Google repeatedly asserts there is “no evidence” that
 12 Google joins authenticated data with unauthenticated data.

13 Unmasked, what Google really seeks is a factual finding on a hotly contested issue, and one
 14 this Court already refused to make. At summary judgment, Google argued that Plaintiffs’ claims
 15 should be dismissed because private browsing data is “anonymous.” *See* Dkt. 934 (Google’s MSJ
 16 Reply) at 2. This Court disagreed. In addition to rejecting Google’s legal argument that Plaintiffs
 17 must prove the data is identifying, this Court found there is sufficient evidence to support Plaintiffs’
 18 factual argument that the data *is* identifying:

19 ***[P]laintiffs set forth evidence that Google does store their data with unique identifiers.***

20 (PAF 25.) For example, plaintiffs have evidence that Google stores users’ regular and private
 21 browsing data in the same logs; it uses those mixed logs to send users personalized ads; and, even if the individual data points gathered are anonymous by themselves, when aggregated, Google can use them to “uniquely identify a user with a high probability of success.” This
 22 supports plaintiffs’ showing that they suffered concrete harm.

23 Dkt. 969 at 11 (emphasis added).

24 The Court got it right (again). Even Google’s engineers agree with Plaintiffs. Internally (not
 25 publicly), Google’s employees made it “perfectly clear” that “the data collected while [in] Incognito
 26 [mode] is ***strictly NOT anonymous.***” GOOG-CABR-00501220 (Ex. 1) (emphasis added). They
 27 dismissed as “*laughable*” the “ [REDACTED]
 28 [REDACTED] GOOG-BRWN-00433503 (Ex. 2), and they “would ***never say] that Google doesn’t***

1 ***know who you are while you're Incognito.***" GOOG-CABR-04780837.R (Ex. 3).

2 Google's Motion emphasizes how Plaintiffs' counsel explained to the Court that "we do not
 3 have evidence that they joined them *in the sense that they want to use the word 'joined.'*" Mot. at 2
 4 (emphasis added). But that statement only underscores why it is inappropriate to resolve this issue
 5 through a motion *in limine*. Plaintiffs' technical expert will explain why Google's definition of
 6 "joined" is overly restrictive and beside the point. He analyzed the data produced in this case, and
 7 he concluded that it is keyed to unique identifiers, which makes the data identifying. Hochman
 8 Opening Rep. § VIII.F (Dkt. 608-12). He will also describe the [REDACTED] log" where Google stores
 9 [REDACTED]—a fact which contradicts Google's
 10 prior (false) assurance to the Court that "logs are internally segregated by whether you're logged
 11 into a Google account or aren't." Apr. 29, 2021 Hearing Tr. at 16:19-20; Hochman Second Supp'1
 12 Rep. ¶¶ 43-46 (Dkt. 990-1). Even without this overwhelming evidence in Plaintiffs' favor, Google's
 13 motion would be improper. "[A] motion *in limine* should not be used to resolve factual disputes or
 14 weigh evidence or used as a substitute for a motion for summary judgment." *Zamora v. BMW of N.*
 15 *Am., LLC*, 2022 WL 17061082, at *1 (C.D. Cal. Sept. 13, 2022).

16 Finally, the only thing that may "confuse the jury" (Mot. at 1) is Google asserting that private
 17 browsing data is "anonymous" when Google's own engineers internally admit that Incognito data is
 18 "strictly NOT anonymous," and Google actually stores that private browsing data in the same log as
 19 regular data. If Google's lawyers still like the argument, they can go for it. But the argument should
 20 rise or fall on the evidence. Google's motion for a shortcut should be denied.³

21 **III. CONCLUSION**

22 Plaintiffs respectfully request that this Court deny Google's Motion *in Limine* Number 4.

23
 24
 25 ³ Google's two cases about "mini-trials" are inapposite because they involved plainly irrelevant
 26 evidence. The court in *Harvey v. Cook* excluded evidence about FDA processes that were irrelevant
 27 to a "product's independent safety and efficacy—the very subjects of the plaintiff's products liability
 28 claim." 2015 WL 1405558, at *2. Similarly, the court in *Tennison v. Circus Circus Enterprises* (a
 sexual harassment case) excluded evidence about "complaints [that] did not involve Plaintiffs [which]
 occurred five years before." 244 F.3d 684, 689 (9th Cir. 2001).

1 Dated: October 17, 2023

Respectfully submitted,

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